No. 78-120

In the Supreme Court of the United States

OCTOBER TERM, 1978

ORVILLE S. CLAVEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
GEORGE L. HASTINGS, JR.
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The district court issued no written opinion. The opinion of the original panel of the court of appeals (Pet. App. la-29a) is reported at 565 F. 2d 111. The court of appeals granted rehearing en banc with respect to the issue of disclosure of the grand jury testimony (Pet. App. 30a). By an equally divided court, the court of appeals affirmed the order of the district court on the grand jury disclosure issue without opinion (Pet. App. 31a-39a).

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on June 23, 1978 (Pet. App. 31a). The petition for a writ of certiorari was filed on July 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of giving false testimony before a grand jury when, in a separate proceeding prior to his indictment, his request for a transcript of his testimony before the grand jury was denied on the ground that he had shown no particularized need for invasion of grand jury secrecy.

2. Whether the trial court erred when, without consulting counsel, it advised the jury, in response to its questions concerning the indictment, that it could not have copies of the court's instructions and then instructed it to continue to deliberate.

3. Whether the trial court committed reversible error by instructing the jury on an issue as to which there was no evidence at trial.

STATUTE INVOLVED

18 U.S.C. 1623 provides in pertinent part:

> FALSE DECLARATIONS BEFORE GRAND JURY OR COURT.
>
> (a) Whoever under oath * * * in any proceeding before * * * any * * * grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000.00 or imprisoned not more than five (5) years, or both.
>
> * * * * *
>
> (d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner, a former sheriff of Lake County, Illinois, was convicted on three counts of willfully filing false income tax returns for 1971, 1972, and 1973, in violation of 26 U.S.C. 7206(1), and one count of false testimony before a grand jury, in violation of 18 U.S.C. 1623.[1] The trial court sentenced petitioner to two years' imprisonment on each of the three tax counts, to be served concurrently, and an additional year on the false testimony charge, to be served consecutively to the sentences on the tax counts. The court of appeals affirmed, with one judge dissenting (Pet. App. 1a-29a). The court thereafter granted rehearing en banc, solely on the issue of disclosure of petitioner's grand jury testimony (Pet. App. 30a), and affirmed the district court on that issue by an equally divided court (Pet. App. 31a-39a).

Prior to indictment for any offense, petitioner testified before a federal grand jury on July 18 and September 18, 1974. Subsequently, petitioner retained counsel, who filed a request with the district court for the release of the transcript of petitioner's grand jury testimony. Petitioner alleged that he was unable to recall his grand jury testimony because of a recent illness and an earlier skull fracture and needed the transcript in order to permit him to consult with counsel as to whether to reappear before the grand jury and recant his testimony. The district court denied petitioner's request for a transcript on the ground that he had failed to demonstrate with particularity a compelling necessity for invasion of grand jury secrecy (Pet. App. 3a). Petitioner did not appeal from this order, but he later raised the matter before the trial court in a

---

[1] Petitioner was acquitted on three other counts of false testimony and one count of conspiring to extort funds from a liquor license holder.

motion to suppress his grand jury testimony, alleging that he had been denied effective assistance of counsel in evaluating his option under 18 U.S.C. 1623(d) to recant any false declaration made before the grand jury (Pet. App. 3a).

The trial court denied the motion and the court of appeals affirmed. As the court of appeals observed, "[w]e find significant, as did the district court, that [petitioner] refused to verify his petition as the district court requested" (Pet. App. 4a). It therefore concluded that the district court was "appropriately skeptical" (*ibid.*) of petitioner's claim that his physical impairments resulted in his failure to recall his grand jury testimony. Moreover, the court noted that even without a transcript, petitioner could have obtained any information concerning his prior testimony by reappearing before the grand jury and requesting a review of his testimony (*ibid.*).

At trial, the government presented evidence showing that while serving as county sheriff, petitioner received unreported income from several county residents in a series of transactions executed by his chief deputy (Pet. App. 1a). Bank account records of petitioner's political campaign fund were also admitted into evidence. However, as the trial proceeded, neither the government nor petitioner made use of the records or included them in their respective theories of prosecution or defense. The district court instructed the jury, over petitioner's objection, that if it found beyond a reasonable doubt that campaign funds were diverted to petitioner's personal use, the funds would be taxable income to him (Pet. App. 6a). The court of appeals found this instruction to be harmless error (Pet. App. 7a). As the court observed, the instruction by its own terms required the jury to find diversion of campaign funds to petitioner's personal use beyond a reasonable doubt. Because there was no

evidence of such diversion, it was unreasonable to suppose that the jury might have convicted petitioner on the basis of this instruction (*ibid.*).

During the jury deliberations, the jury foreman on three occasions sent notes to the trial court, first asking for a copy of the instructions, then twice seeking an explanation concerning the indictment and counts (see Pet. App. 12a-18a). Without notifying counsel of the communications, the court sent the jury written notes answering "No" to the first inquiry and "continue to deliberate" to the other two (Pet. App. 12a-13a). The court of appeals determined that, while the trial court erred in disposing of the jury's inquiries without consulting counsel, the error could not have affected the verdict and was likewise harmless in the particular circumstances of this case (Pet. App. 14a-15a).

ARGUMENT

1. Petitioner argues (Pet. 8-12) that he was deprived of his right to effective assistance of counsel when the district court denied his petition for a copy of his grand jury testimony.

In his initial petition for production of the grand jury testimony (Appendix to Government's Response to Petition for Rehearing, at C-1 to C-3), petitioner simply stated that he was "unable to tell counsel the substance of his testimony before the Grand Jury" (*id.* at C-2) and that he "did not, when he employed counsel, have any coherent and complete memory of the substance of the questioning before the Grand jury" (*id.* C-3). At the hearing on this petition, the district court expressed the view that the petition was faulty because it was not sworn to in writing (*id.* at E-2). The court then granted petitioner leave to file an amended petition (*id.* at E-2 to E-5), stating that "[t]here * * * [might] be something you

want to include in the petition because it is very broad" (*id.* at E-2) and "I want a full and complete petition" (*id.* at E-4).

Subsequently, petitioner filed an amended petition (*id.* at F-1 to F-5). This petition, which was also not verified in writing, stated that "[p]etitioner did, during the early part of 1974, suffer a severe illness the course of which included periods of unconsciousness and treatment by drugs which had an effect on Petitioner"; that [p]etitioner believes that his memory and his mental faculties were adversely affected by said illness, and believes that the effect continues to this day"; that "[t]he adverse effect has included losses of memory as to certain periods of time and specific incidents, and confusion"; that [p]etitioner did, many years ago, suffer a fractured skull, and, over the years, has had occasional lapses of memory and short periods of mental confusion"; that petitioner had "been unable to tell counsel the substance of his testimony before the Grand Jury"; and that "[p]etitioner did not, when he employed counsel, have any coherent and complete memory of the substance of the questioning before the Grand Jury" (*id.* at F-1 to F-2, F-4). At the ensuing hearing on the petition, the district court stated (*id.* at G-3):

> The petition lacks many of the elements. He said this and that happened to him. There is no indication of what doctor, who it is, how it was, or any of the details, that I think should have been set up in the petition * * *.

Petitioner presented no evidence in support of his request. At the conclusion of the hearing, the court gave petitioner five days within which to respond to the government's memorandum (*id.* at G-4). Petitioner filed nothing further. Subsequently the district court denied the petition

(*id.* at I-1), stating that the petition failed "to demonstrate with particularity a 'compelling necessity' for disclosure" (*id.* at I-6).

The district court correctly denied petitioner's request for a transcript of his grand jury testimony. As this Court has held, the secrecy of grand jury proceedings is a long-established principle, and grand jury testimony will be revealed only upon a showing of "compelling necessity," which "must be shown with particularity." *United States* v. *Procter & Gamble*, 356 U.S. 677, 682 (1958); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399-400 (1959). Whether such a showing has been made is a matter for the trial court's discretion, and the standard of review is whether that discretion has been abused. *United States* v. *Procter & Gamble, supra*; *Pittsburgh Plate Glass Co.* v. *United States, supra.*

On the facts of this case, the district court did not abuse its discretion. Here, the record shows that petitioner was well aware of the district court's concern over the lack of particularity in his petitions. Although the court gave petitioner several opportunities to document his request, petitioner nevertheless failed to come forward with any evidence that would support his claim that he was unable to recall his grand jury testimony because of a poor memory attributable to physical impairments. Under these circumstances, the district court "was appropriately skeptical of * * * [the] unverified claim" (Pet. App. 4a) and did not abuse its discretion in concluding that petitioner had not established with particularity a compelling necessity for a transcript of his grand jury testimony.[2]

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[2]In concluding that petitioner was entitled to a transcript of his grand jury testimony, the dissenting judge relied (Pet. App. 22a) upon *United States* v. *Rose*, 215 F. 2d 617 (3d Cir. 1954), and *United*

Petitioner asserts (Pet. 10-12) that any grand jury witness should have access to a copy of his own testimony without being required to make any particularized showing of compelling need. In so contending, petitioner points to the fact that Fed. R. Crim. P. 6(e) imposes no obligation of secrecy upon grand jury witnesses. But the courts of appeals have unanimously required the showing of compelling necessity when a witness seeks a transcript of his own grand jury testimony. See, *e.g.*, *Bast* v. *United States*, 542 F. 2d 893, 896 (4th Cir. 1976); *In re Bianchi*, 542 F. 2d 98, 100 (1st Cir. 1976); *United States* v. *Fitch*, 472 F. 2d 548, 549 n.6 (9th Cir.), cert. denied, 412 U.S. 954 (1973). See also *In re Biaggi*, 478 F. 2d 489, 494 (2d Cir. 1973).[3]

Contrary to petitioner's assertions (Pet. 11) and the views of the dissent (Pet. App. 16a-24a), there are sound policy reasons in support of this rule. First, pre-trial production of a grand jury transcript could facilitate subornation and coordination of perjury by others. *In re*

States v. *Remington*, 191 F. 2d 246 (2d Cir. 1951), cert. denied, 343 U.S. 907 (1952). But in those cases, the defendants were already under indictment for perjury before the grand jury at the time they requested the transcripts. Under present law, Fed. R. Crim. P. 16(a)(1)(A) provides for automatic disclosure of the transcripts to indicted defendants.

[3] *Bursey* v. *United States*, 466 F. 2d 1059 (9th Cir. 1972), upon which petitioner relies (Pet. 10), is distinguishable. There, the court did not eliminate the need for a witness to show compelling necessity before obtaining a transcript of his own grand jury testimony; it merely ruled that such necessity is shown when a witness is recalled before the grand jury to answer repetitious questions. See *Bast* v. *United States*, *supra*, 542 F. 2d at 896.

Although the courts in *In re Russo*, 53 F.R.D. 564 (C.D. Cal. 1971), and *In re Craven*, 13 Crim. L. Rep. 2100 (N.D. Cal. 1973), expressed the view that the showing of compelling necessity was not required, the witnesses in those cases did make such a showing.

Grand Jury Witness Subpoenas, 370 F. Supp. 1282 (S.D. Fla. 1974). Second, release of the transcript could disclose the nature of the information that had previously come to the attention of the grand jury. Finally, and perhaps most important, the rule aids in the protection of witnesses. Often, witnesses cooperate with grand juries without the knowledge of their associates. If access to transcripts required little more than a request by the witness, every witness who did not produce a transcript would be suspected by his confederates of cooperation with the prosecutor. See *In re Grand Jury Witness Subpoenas*, *supra*; *In re Alvarez*, 351 F. Supp. 1089 (S.D. Cal. 1972). Indeed, these considerations are particularly pertinent here, where petitioner requested the transcript during the pendency of an ongoing investigation. *In re Bonnano*, 344 F. 2d 830, 834 (2d Cir. 1965).

2. Petitioner further argues (Pet. 12-14) that the trial court committed reversible error by responding, without consulting counsel, to the jury's requests for a copy of the instructions and for a further explanation as to the indictment and counts. The court of appeals determined that, while the trial court erred in not informing counsel of the jury's requests and in not further addressing the jury's inquiries, the error could not have harmed petitioner under the particular circumstances of this case (Pet. App. 14a-15a). The court's ruling is correct and does not in any event warrant review by this Court.

As the court of appeals recognized (Pet. App. 14a), the submission of written instructions to the jury is a matter within the trial court's discretion. See, *e.g.*, *United States* v. *Davis*, 437 F. 2d 928, 929 n.1 (7th Cir. 1971). Here, the trial court's failure to consult counsel before telling the jury, in response to its question, that it would not be allowed to have copies of the instructions, could not have prejudiced petitioner.

Nor was petitioner harmed by the court's response to the second and third questions from the jury. In the second question the jury asked (Pet. App. 12a), "[i]s it possible to have the judge explain a couple of points about the indictment and the counts?" The judge responded "No" and told the jury to "continue to deliberate." The decision whether to afford further instruction to the jury is also within the trial court's discretion. *Salzman* v. *United States*, 405 F. 2d 358 (D.C. Cir. 1968); *United States* v. *Toney*, 440 F. 2d 590, 592 (6th Cir. 1971). The fact that the jury was able to utilize the original instructions to render a verdict based upon the substantial evidence indicates that the trial court did not abuse its discretion. There is no reason to believe, in light of the entire record, that any further explanation of the court's instructions would have altered the outcome. Thus, the court of appeals correctly ruled (Pet. App. 14a-15a) that the trial court's decision to provide no further response to this question could not have harmed petitioner.

The jury's third question was as follows (Pet. App. 13a):

> Judge Lynch: The counts in the indictment are related to one another, some more than others. For example, count 2 is related to count five. In this respect, if we find the defendant guilty on count two and count three, must we also find him guilty on count one?

The court responded by telling the jury to "continue to deliberate" (Pet. App. 13a). Shortly thereafter, the jury returned with a verdict finding petitioner guilty, *inter alia*, on counts three and five and acquitting him, *inter alia*, on counts one and two. As the court of appeals recognized (Pet. App. 14a-15a), the jury obviously resolved this

question—*i.e.*, whether petitioner had to be found guilty on counts one and two if he was found guilty on counts three and five—in favor of petitioner. Any error in failing to respond to the jury's question was therefore harmless.

3. Finally, petitioner argues (Pet. 14-15) that the trial court erred in instructing the jury on matters as to which there was no evidence. At trial, bank account records of petitioner's political campaign fund were admitted into evidence. As the trial proceeded neither side made use of the records or included them in their respective theories of prosecution or defense. The district court instructed the jury, over petitioner's objection, that if it found beyond a reasonable doubt that campaign funds were diverted to petitioner's personal use, the funds would be taxable income to him (Pet. App. 6a).

The court of appeals correctly held that this instruction was harmless error (Pet. App. 7a). The inclusion of superfluous matter in jury charges has been held, in appropriate circumstances, to be harmless error under Fed. R. Crim. P. 52. See, *e.g.*, *United States* v. *Naylor*, 566 F. 2d 942 (5th Cir. 1978); *United States* v. *Smith*, 343 F. 2d 607 (2d Cir. 1965); *United States* v. *Demopoulos*, 506 F. 2d 1171 (7th Cir. 1974), cert. denied, 420 U.S. 991 (1975); *Long* v. *United States*, 360 F. 2d 829 (D.C. Cir. 1966).[4] Here, nothing in the voluminous record, which

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[4]United *States* v. *Breitling*, 61 U.S. (20 How.) 252 (1857); and *Morris* v. *United States*, 326 F. 2d 192 (9th Cir. 1963), upon which petitioner relies (Pet.14-15), do not conflict with the decision below. *Breitling* long antedates the promulgation of the harmless error rule set forth in Rule 52. In *Morris*, the disputed charge was that the defendant's flight after the alleged crime could be used as evidence of guilt. While the government introduced no direct evidence that the defendant had fled, a government witness did indulge in innuendo by way of referring to defendant as a "fugitive." Thus, the instruction in *Morris* was harmful because it could have led a jury to indulge in speculation; in this case, the record shows no such possibility.

provides a wealth of relevant evidence on which the jury could and did properly convict, suggests any reason for the jury to suspect that petitioner diverted campaign funds. Since the trial court's instruction could have led the jury to convict on this basis only if it found diversion beyond a reasonable doubt, the court of appeals correctly concluded that "the jury could not have convicted Clavey on the basis of the campaign fund instruction" (Pet. App. 7a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
GEORGE L. HASTINGS, JR.
Attorneys

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